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Federal Communications Commission
Washington, D.C. 20554
JUN 17 2004 JUN 17 2004

DISPATCHED BY MM Docket No. 93-265 ✓

In re Application of

PINE TREE
MEDIA, INC.

File No. BR-900817UF

For Renewal of License of
Station KARW
Longview, Texas

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1994;

Released: June 17, 1994

By the Review Board: MARINO (Chairman) and
GREENE.

1. Before the Review Board are two Appeals of Praise Media, Inc. to the *Memorandum Opinion and Order* of Administrative Law Judge John M. Frysiak, FCC 94M-90, released February 24, 1994 (*MO&O*). The first appeal, filed March 3, 1994 pursuant to 47 CFR 1.301, is to the ALJ's denial of Praise's Petition to Accept Late-filed Notice of Appearance and his ruling that Praise is not a successor or assign of Pine Tree Media, Inc. for purposes of participating in the above-captioned proceeding. (Appeal I.) This was opposed by the Commission's Mass Media Bureau on March 21, 1994 (First Opposition). The second appeal, filed March 28, 1994 pursuant to 47 CFR 1.302,¹ is to the ALJ's dismissal of the KARW renewal application and his termination of the proceeding. (Appeal II.)² This was opposed by the Mass Media Bureau on April 11, 1994 (Second Opposition). Praise filed a reply on April 26, 1994. The Board has received no pleading whatever from Pine Tree Media, Inc., the KARW licensee and putative renewal applicant. Because Praise's dual appeals are rooted in the ALJ's denial of party status to Praise and the consequent termination of the proceeding for lack of an appearance by a party, we will treat the appeals together.

BACKGROUND

2. This proceeding was initiated by *Hearing Designation Order and Notice of Forfeiture*, 8 FCC Rcd 7591 (1993) (*HDO*), to determine whether the application of Pine Tree Media, Inc. for renewal of the KARW license should be granted. The *HDO* specified the following additional issues for making this determination:

1. To determine whether one or more unauthorized transfers of control of Pine Tree Media, Inc. occurred in violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 and/or Section 73.3541 of the Commission's Rules.

2. To determine whether Pine Tree Media, Inc. and/or persons acting on its behalf misrepresented facts in the station's 1990 renewal application.

3. To determine whether Pine Tree Media, Inc. and/or persons acting on its behalf violated Section 73.1015 of the Commission's Rules by failing to respond fully to Commission correspondence dated September 9, 1992, September 23, 1992, December 3, 1992, and/or February 10, 1993.

4. To determine whether Station KARW is in compliance with the following Commission rules: Section 1.1307(b) (environmental assessment); Sections 17.21 through 17.23 (tower painting); Section 73.932 (emergency broadcast equipment); 73.1745(a) (transmitter power); Sections 73.1800 and 73.1820 (station logs); and 73.3526 (public file).

The *HDO* placed the burdens of proceeding and proof "upon Pine Tree Media, Inc., its successors or assigns and/or those persons now in control of Pine Tree Media, Inc., as appropriate." 8 FCC Rcd at 7593 ¶ 16. Because Pine Tree was suspected of committing, *inter alia*, an unauthorized transfer of control, the *HDO* conferred party status on "American Plastics, H. E. Ferrell and Robert D. Murray." *id.* ¶ 17. The possible transferees known to the Commission from an earlier station inspection. *See id.* at 7591 ¶¶ 4-5. The *HDO* then ordered "Pine Tree Media, Inc., its successors and assigns, American Plastics, H. E. Ferrell and Robert D. Murray" to file a notice of appearance stating their intention to participate within twenty days of the mailing of the *HDO*. *Id.* at 7593 ¶ 18. It also ordered that "Pine Tree Media, Inc., its successors and assigns and/or those persons now in control of Station KARW" publish notice of the hearing. *Id.* ¶ 19. The *HDO* was released October 25, 1993.

3. Neither the licensee itself nor the specifically identified parties ever filed a notice of appearance, and none has been heard from by the Commission. However, a Mesquite, Texas attorney, Kenneth Kilgore, sent a letter dated November 12, 1993 to Bureau counsel and the Chief Administrative Law Judge -- but not the Commission Secretary -- stating, "Enclosed for filing is our Notice of Participation and Intervention." *MO&O* at 1 n.1. The attached notice "was submitted on behalf of Janet Washington who claimed an interest in the license and the real property on which KARW operates." *Id.* Despite the absence of any notice of appearance from either the licensee or the suspected transferee(s) identified in the *HDO*, the ALJ scheduled a prehearing conference on January 11, 1994. No one appeared on behalf of Pine Tree, and according to the Bureau, "The Presiding Judge, with the agreement of the Bureau, reset the conference date for January 24, 1994, after noting that he had received a call from Janet Washington who had requested the postponement so that she could retain counsel." First Opposition at 2.

¹ Notice of Appeal was given March 7, 1994.

² The Commission's rules differentiate between appeals of denial of party status (47 CFR 1.301) and appeals of the termina-

tion of a proceeding (47 CFR 1.302) and provide different filing procedures and periods. Thus, Praise filed two appeals. Appeal II at 1 n.1.

4. No one appeared on behalf of Pine Tree or the other named parties at the January 24 prehearing conference. See tr. 7. Instead, a prominent communications attorney identified himself and said:

Your Honor, my name is Alan Campbell of the firm Irwin, Campbell & Crowe. I'm representing today an entity known as Praise Media -- who is not named in the parties of the proceeding, and I have not filed a motion to intervene or otherwise participate at this point, Your Honor. I was just been retained by that company at the end of last week.

Id. When the ALJ asked for an appearance for Pine Tree, counsel explained:

Your Honor, I do not represent Pine Tree. The order references Pine Tree, its accessors [sic] and assigns. My client, Praise Media, may be qualified as an acc-- and to Pine Tree, but I do not know yet, until I have an opportunity to gather more facts.

Id. When asked about the notice of appearance filed by Kenneth Kilgore, Mr. Campbell claimed to be unaware of either Mr. Kilgore or the notice. Tr. 8.³ Bureau counsel stated the Bureau's intention to file a motion to dismiss because Pine Tree had neither filed a notice of appearance nor appeared at the prehearing conference. Tr. 9. In response Mr. Campbell said:

My anticipation is that long before the deadline for filing an opposition to [the Bureau's] motion I would know the facts of the case enough to come in with the understandable opposition, intervention, appearance or whatever it would be and hopefully be in ability to explain to the Commission exactly what has occurred down there. So, I'm sure it's confusing to you and it's confusing to me at this time because of the recent -- being retained by Praise Media.

Tr. 10. He added at tr. 10-11:

I'm here somewhat as a -- I don't know if interloper is a legal title or not, but I'm not a participant today, I understand that.

5. As promised, on January 26, 1994, the Bureau filed a motion to dismiss the Pine Tree renewal application for failure to prosecute. Praise opposed the motion on February 8, and at the same time filed a Petition to Accept Late-Filed Notice of Appearance and a Notice of Appearance. MO&O at 1; Appeal I at 2. The Bureau replied on February 15, opposing the appearance of Praise. After considering these pleadings, the ALJ denied Praise's request to appear, granted the Bureau's motion to dismiss, and terminated the proceeding. He concluded that Praise had failed to establish itself as the successor or assign of Pine Tree because, first, Praise did not appear to have closed on its

claimed purchase of KARW; and, second, Praise did not appear to have sought or received Commission approval for any transfer of KARW. MO&O at 2.

PLEADINGS

6. Both before the ALJ and now before the Board, Praise has argued that it is a successor and assign of Pine Tree and, therefore, entitled to intervene. Praise's claim is based on a February 10, 1992 Memorandum between Herbert Wren and Earl Jones, Jr. as seller and Eugene Washington and Ray Lee Williams, acting respectively as President and Vice President of Praise, as buyer. This Memorandum provides:

WHEREAS, . . . [Wren and Jones] have this day conveyed unto PRAISE MEDIA, INC., a Texas corporation, hereinafter referred to as "BUYER", certain real and personal properties comprising the Radio Station located at 2929 Signal Hill Road, Longview, Texas 75603; and,

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the undersigned as follows:

- 1) Seller hereby assigns unto Buyer all of Seller's right, title and interest in and to the corporation known as "PINE TREE MEDIA, INC." and any Federal Communications Commission Operator's License associated with the Radio Station at 2929 Signal Hill Road, Longview, Texas 75603;
- 2) Buyer agrees that any expense involved in transferring such license, including without limitation, application fees and attorney's fees, shall be borne exclusively by Buyer; and,
- 3) Buyer acknowledges that Seller is not warranting the transferability of such license but agrees to execute any documents necessary to effect such transfer.

Appeal I, Exh. 5. This Memorandum was accompanied by the following documents executed on February 10, 1992: Warranty Deed, Deed of Trust, Vendor's Lien Note, Bill of Sale, and Security Agreement.⁴ Appeal I at 3 and Exh. 5. According to Praise, "These documents constituted both the agreement between the parties and the consummation of that agreement." Appeal I at 3. See March 3, 1994 Affidavit of Janet Washington, who identified herself as "General Manager of AM radio station KARW, Longview, Texas, and Treasurer of Praise Media, Inc." Appeal I, Exh. 6. Ms. Washington affirmed in her Affidavit:

Praise Media, Inc., which was not represented by legal counsel at the time these documents were prepared and executed, not only entered into the agreement to purchase station KARW on February 10,

³ Nothing further has been heard from Mr. Kilgore.

⁴ In addition to real and personal property, the Security Agreement provides for the following collateral: "All right, title and interest now owned or hereafter acquired by Debtor in and to

any Federal Communication [sic] Commission Operator's license for the Radio Station located at 2929 Signal Hill Road, Longview, Texas 75603." Exh. "A" to Security Agreement, Appeal I, Exh. 5.

1992, but also consummated the purchase of the station on that date. It was Praise Media's understanding at that time that the sale of the station could be consummated prior to requesting approval of the license transfer.

7. According to Praise, the interest Wren and Jones sold to Praise came about through a series of transactions, foreclosures and repossessions that started with Wren and Jones' ownership of Pine Tree and their 1988 transfer of control of Pine Tree to one Kenneth Tuck. *HDO*, 8 FCC Rcd at 7591 ¶ 2. The Commission authorized this transfer. Tuck never filed the required ownership report with the Commission to confirm consummation of the transfer, *id.* at n.2, but he made a promissory note to Wren and Jones "in payment for station KARW and/or the stock in Pine Tree." Appeal I at 3. Tuck died in May 1990 and, on May 17, 1990, the note held by Wren and Jones was transferred to a company known as American Plastic Products, Inc. *HDO* at 7591 ¶ 4; Appeal I at 3. Praise further explained at Appeal I at 3 (citations to exhibits omitted):

American Plastics foreclosed on the assets securing that note on or about July 3, 1990. The assets securing the note included the real and personal property associated with the station and the stock of Pine Tree.

On August 6, 1991, Wren and Jones foreclosed on a note issued to them by American Plastics and thereby reacquired the assets securing that note, including the stock of Pine Tree and the real and personal property associated with the station.

The note issued by American Plastics included 10,000 shares of Pine Tree common stock as collateral. Appeal I, Exh. 4.⁵ The sale to Praise followed from this foreclosure against American Plastics. According to Praise, the Memorandum evidencing its purchase provides:

Praise has acquired all right and title to the assets of station KARW to which Wren and Jones had an interest, along with any interest Wren and Jones had in Pine Tree and the license for KARW. As described above, the interest in KARW transferred by Wren and Jones can be traced directly to Pine Tree and Tuck, thus clearly establishing Praise as Pine Tree's successor and assign.

Appeal I at 4.

8. Having traced the station's Pine Tree lineage back to Wren and Jones and their first buyer, Tuck, Praise is claiming the right to intervene in this renewal hearing as a "successor or assign" of Pine Tree. As to the fact that no application to assign the license to Praise had, or has, ever been filed, Praise is submitting that the *HDO* is expressly directed to Pine Tree or its "successors and assigns." See

Appeal I at 5. Indeed, it said in Appeal II, at 5 (emphasis in original): "The *HDO*, recognizing that the facts available to the Commission indicated that transfers of control may have occurred and that no applications to approve these transfers had been filed, demanded an appearance from Pine Tree 'or its successors and assigns.'" Further, "it stands to reason that the Commission would not have demanded the appearance of successors and assigns if it had not intended to grant party status to such entities whether or not FCC applications to assign or transfer control had been filed. Thus, the *HDO* clearly requires the participation of successors and assigns whether or not applications to assign or transfer control have been filed." *Id.* at 6. "[H]aving demonstrated its ownership of the station by contract law," Praise argues that the ALJ erred in denying it intervention rights (and terminating the KARW license renewal hearing) and that "the *HDO*'s requirement that 'successors and assigns' of Pine Tree enter an appearance is frustrated." Appeal I at 5; see Appeal II at 6.

9. The Bureau, in advocating denial of Praise's appeals, stated the procedural difficulties with the case, *i.e.*, Praise's failure to file the November 12, 1993 notice of appearance with the Commission's Secretary and its failure to enter an appearance at either prehearing conference. It is viewing Janet Washington, on whose behalf the November notice was submitted, "not only as a stranger to this proceeding, but also to the Commission." First Opposition at 4. As to Praise's asserted right to participate regardless of the lack of any Commission authorization, it said at *id.*:

Absent Commission approval of an assignment or transfer application, Praise Media has no entitlement to the KARW authorization and no right to prosecute Pine Tree's renewal application. At best all that transferred was the real and personal property of Pine Tree. This is insufficient to establish Praise Media as a successor or assign of Pine Tree.

In opposing Praise's second appeal, the Bureau is interpreting the *HDO* language about successors and assigns to limit participation only to putative successors known to the Commission at the time the *HDO* was issued. "Assuming an assignment application had been filed and granted," the possible successors could only be the heirs of the deceased Tuck "or perhaps American Plastics, which was the apparent successor to a note held by Tuck." Second Opposition at 3. "Moreover," according to the Bureau, "the *HDO* limits the filing of a notice of appearance by those currently operating the station to those granted party status, American Plastics, and/or H. E. Ferrell and Robert Dub Murray. Praise Media is not included in this list." *Id.* at 3-4. Because Praise was not granted party status in the *HDO*, the Bureau is arguing tautologically that Praise has no standing here to file a notice of appearance.

⁵ It was during the American Plastics tenure that the Commission inspected the station and became aware of a possible unauthorized transfer of control involving American Plastics and Messrs. Ferrell and Murray, who appeared to be operating the station on behalf of American Plastics. See *HDO*, 8 FCC Rcd at 7591 ¶ 4. There is no indication in the *HDO* that the Commission was aware that the station was later being operated by persons connected with Praise until the November 1993

notice from Praise and the pleadings before the ALJ. Praise admits that, "[i]nsofar as the Commission records are concerned, there are no applications or reports concerning these foreclosures and repossessions." Appeal I at 3 n.1. The Commission acknowledged, however, that someone other than American Plastics might have taken over control of the station. See *HDO*, 8 FCC Rcd at 7592 ¶ 8 and discussion at ¶ 12, *infra*.

10. In reply to the Bureau's Second Opposition, Praise is arguing that the Bureau's reasoning would rob the Commission's requirement that successors and assigns file appearances of any meaning or practical effect. It is further arguing that limiting participation only to those named in the *HDO* or Tuck's heirs is inconsistent with the *HDO*'s acknowledgement that unnamed others may be in control.

DISCUSSION

11. *Party in Interest.* The question of Praise's right to party status turns on whether Praise is a party in interest to the KARW renewal application. Title 47 CFR 1.223(a) specifically provides an opportunity for those *not* named as parties but who qualify as a party in interest to seek intervention, and further provides: "Where the person's status as a party in interest is established, the petition to intervene will be granted." This is fully consistent with both the Communications Act requirement that any hearing "shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate." 47 U.S.C. § 309(e). This is also fully consistent with the Administrative Procedure Act requirement that the agency "shall give all interested parties" an opportunity to participate in agency adjudications "when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c). Had the *HDO* addressed Praise's involvement with KARW and denied it party status, the *HDO* resolution would be controlling for the Board lacks authority to review matters discussed therein. See *Lion's Share Broadcasting*, 8 FCC Rcd 8423, 8423 ¶ 3 (Rev. Bd. 1993); *Fl. Collins Telecasters*, 103 FCC 2d 978, 984-85 ¶ 7 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 2780 (1987), *aff'd by judgment*, 841 F.2d 428 (D.C. Cir. 1988). But, the *HDO*'s silence with respect to Praise's status would seem to reflect the Commission's unawareness of Praise's claimed succession to KARW's ownership or its asserted role as the current station operator. In these circumstances we can find no guidance from the *HDO*'s failure to designate Praise and must reject the Bureau's point to the contrary.

12. Likewise, we must reject the Bureau's counterpoint, that Praise's asserted interest is unauthorized and not even the subject of an application. American Plastics stood in precisely the position now held by Praise, *i.e.*, purported acquirer of an interest from Pine Tree's creditors and former owners, Wren and Jones, without benefit of prior Commission authorization, and it was named a party by the *HDO*. But, at the same time it named American Plastics a party because its representatives, Ferrell and Murphy, appeared to be operating the station when Commission personnel conducted an inspection, *HDO*, 8 FCC Rcd at 7591 ¶ 4, the Commission acknowledged in the *HDO* that its information was not current. Beginning with a letter in September 1992, the Commission, *inter alia*, "endeavored to ascertain the identity of the persons operating the station in order to determine whether an unauthorized transfer of control had occurred" in violation of the Communications Act or the Commission's rules. *Id.* ¶ 5. It finally received an unsigned written response on January 26, 1993, indicating that "Ferrell and Murphy no longer managed the station. However, the response did not identify who does

control the station or how they came to acquire such control." *Id.* at 7592 ¶ 8. It is within that context that the Commission designated issues to determine "whether one or more unauthorized transfers of control of Pine Tree Media, Inc. occurred," and whether Pine Tree "and/or persons acting on its behalf" misrepresented facts in the renewal application and failed to respond fully to Commission correspondence. *Id.* ¶ 13. It is also within that context that the Commission placed the burdens of proceeding and proof on "Pine Tree Media, Inc., its successors or assigns and/or those persons now in control of Pine Tree Media, Inc., as appropriate." *Id.* at 7593 ¶ 16. It is also within that context that the Commission directed Pine Tree and "its successors and assigns" to file notices of appearance. *Id.* ¶ 18. Finally, it is within that context that the Commission ordered "Pine Tree Media, Inc., its successor and assigns and/or those persons now in control of Station KARW" to publish notice of the hearing. *Id.* ¶ 19.

13. Praise has established a colorable claim as the successor or assign of Pine Tree under contract law, even if not under the law governing the assignment and transfer of stations before the Commission. Its documentary exhibits show a succession of transactions by which Wren and Jones sold, repossessed, and resold the station and its assets, including Pine Tree stock, ultimately to Praise who produced a bill of sale and the Memorandum described *supra*, ¶ 6, as well as additional documents giving a security interest to Wren and Jones in the station property and purportedly in the license as well. See Exh. "A" to Security Agreement, Appeal I, Exh. 5. Janet Washington has twice declared under penalty of perjury that Praise bought the station from Wren and Jones on February 10, 1992 and that she is the General Manager. March 3, 1994 Affidavit, Appeal I, Exh. 6; March 28, 1994 Affidavit, Appeal II, Exh. 6. At stake, then, is Praise's investment in the station, which establishes a direct economic interest in the outcome of the proceeding. Whether or not the parties to these contract transactions secured the appropriate Commission authorizations, and the effect on the pending KARW renewal application if they did not, are questions at issue under the *HDO*.⁶ These should not be prejudged in the guise of denying party status to one who claims to hold Pine Tree's interest in KARW and has a substantial direct economic interest in the outcome, which will be adversely affected if Praise is not made a party to the proceeding. This is sufficient to establish Praise's right to participate as a party in interest. See generally *Minnesota Microwave, Inc.*, 1 RR 2d 928, 929 ¶ 2 (Rev. Bd. 1964). In addition, Praise has information relevant to all but, perhaps, the misrepresentation issue. The novelty here is that the entity last authorized by the Commission to hold control of the KARW license died before the renewal application was filed in its behalf, but this was known to the Commission when it issued the *HDO* ordering appearances from Pine Tree and its successors and assigns and ordering both "successors or assigns and/or those persons now in control of Pine Tree Media, Inc." to meet the burdens of proceeding and proof. *HDO* at 7593 ¶¶ 16, 18 (emphasis added).

14. *Procedural Issues.* In addition to its arguments discussed above, that Praise could not enter a notice of appearance without prior Commission approval of its status

⁶ Cf. *Silver Star Communications-Albany, Inc.*, 6 FCC Rcd 6905, 6906-07, 6908 n.8 (1991) (unauthorized transfer of control not *per se* disqualifying; in light of FCC decision not to revoke

licenses because of unauthorized transfer, future assignment application/s of licensee were to be routinely processed).

through either mention in the *HDO* or action on an assignment or transfer application, the Bureau recited incidents of Praise's asserted failure to comply with the *HDO*'s appearance requirement.⁷ The Bureau stated that Praise improperly directed its November 12, 1993 Notice of Appearance and twice failed to appear at prehearing conferences. But, the Bureau admits that Janet Washington had asked the ALJ for a postponement of the first prehearing conference on Praise's behalf and the Bureau had agreed. See ¶ 3, *supra*; First Opposition at 2. Praise was represented at the second prehearing conference by newly-hired counsel who needed more time to gather facts about Praise's status before entering a formal appearance on Praise's behalf. See ¶ 4, *supra*. Nonetheless, counsel agreed to procedural dates with the Bureau and completed his review and response to the Bureau's motion to dismiss without seeking additional time and filed a notice of appearance and request for acceptance within that time.

15. The ALJ's rationale for denying Praise's participation was his mistaken view that Praise had not sufficiently established itself as Pine Tree's successor or assign. In that context he said, "To date, no notice appearance has been filed by Pine Tree or its successors and assigns," and concluded that Praise cannot be a party in interest without prior Commission approval of its application. *MO&O* at 1-2 and n.1. His ruling was not based on any finding that Praise had engaged in "the sort of inexcusable or contumacious behavior" that warranted dismissal for failure to prosecute in *Innovative Women's Media Ass'n v. FCC*, 16 F.3d 1287, 1289-90 (D.C. Cir. 1994), or any weighing of the standards for dismissal in *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988).⁸ This Board will not expand the ALJ's ruling by characterizing Praise's imperfect efforts to make its interest known as either inexcusable or contumacious and elevating the procedural deficiencies here to an independent basis for denying Praise's request to appear.

16. ACCORDINGLY, IT IS ORDERED That the Appeals of Praise Media, Inc. filed March 3 and March 28, 1994 ARE GRANTED; and That this proceeding IS REMANDED to the Presiding Officer.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

⁷ The Bureau sought permission to file its First Opposition one day late. First Opposition at 1 n.1. Praise correctly notes that the Bureau's opposition to its appeal under 47 CFR 1.301 was significantly more than one day late. Oppositions to appeals under 1.301(a)(1), "shall be filed within 5 days after the appeal is filed." 47 CFR 1.301(c)(7). Pursuant to the Commission's rule for computing the terminal time for a filing period, the Bureau's opposition to Praise's March 3, 1994 appeal was due March 10 and was eleven days late when filed on March 21. See 47 CFR 1.4(d), (e), (g) (weekend days are excluded from the computation of filing periods that are less than seven days). No motion to strike was filed, however, and the Bureau's opposition is accepted.

⁸ The *Comuni-Centre* court said, 856 F.2d at 1554 (footnote omitted):

In reversing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and deter future misconduct.